THE TREATY-MAKING POWER

FOURTEEN POINTS SHOWING WHY THE TREATY-MAKING POWER SHOULD BE SHARED BY THE HOUSE OF REPRESENTATIVES

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Because the treaty-making power of the United States excludes the House of Representatives and conflicts with the principle of majority rule it has been the source of official friction and popular dissatisfaction ever since it was created.

The framers of the Constitution were aware that they were departing from the rule that was to control all other parts of the Government, but a coalition forced the issue, insisting that the Constitution set up what they thought was an immovable barrier against possible sacrifice of the States or the people in treaties made by faithless or foolish officials subject to foreign influence.[1]

Although a minority warned of trouble to come from the arrangement, the majority dealt as best they could with the conditions as they existed at the time. They reminded their critics that the Constitution could be amended if conditions in the future should make revision advisable.

The framers planned that the primary function of the Senate should be to advise the President. It was to consist of a few members, elderly ambassadors of States, sitting almost continuously, charged with the conservation of property, participating actively in the selection of officials and diplomatic envoys, and vigilantly watching every step of treaty negotiations. Both before and after adoption of the Articles of Confederation Congress had directed treaty negotiations, and at first the constitutional convention tentatively lodging the whole treaty-making power in the Senate.

Against the argument that the House should share in treaty making since it represented the people directly, the majority replied that the House would be a numerous body, frequently in recess, and unable to act with the secrecy and dispatch necessary for successful treaty negotiations. Throughout the deliberations it was assumed by all that the President would be constantly advised by the Senate in the matter of negotiating treaties, including the formulation of instructions to envoys whose nominations had run the gantlet of Senate scrutiny.

The rule requiring concurrence of two-thirds of the Senators present to consummate a treaty was challenged in the convention. Various alternatives were proposed, including participation by the House, concurrence by a majority, concurrence by two-thirds of all Senators, waiver of the rule in the case of peace treaties, exclusion of the President in the making of peace treaties, etc. In the end the two-thirds rule was adopted as a compromise, on the plausible

[1] See generally Farrand, Records of the Federal Convention; also Crandall, Treaties, Their Making and Enforcement (2d ed.).

ground that it would be practically impossible to induce such a proportion of Senators to sacrifice the people's interests.

New England delegates were fearful that American fishing rights might be bargained away by treaty. Southern delegates, whose States possessed great western tracts, were determined to prevent surrender of navigation of the Mississippi River, a right which they were prepared to defend by war if necesary. "The fisheries and the Mississippi," said Gouverneur Morris in the convention, "are the two great objects of the Union." [2]

Hugh Williamson, a delegate from North Carolina, frankly disclosed the attitude of the Southern States in voting for the two-thirds rule relating to treaties. In July 1788, when the Constitution was under consideration in State conventions, Mr. Williamson wrote as follows to James Madison:

Of all the wrong heads who have started in opposition none have been mentioned who appear to be so palpably wrong as the People of Kentucke. It is said that some Antifed in Maryland on the last winter fastened on the Ear of Genl Wilkinson who was accidentally there and persuaded him that in case of a new Govt. the Navigation of the Mississippi would be infallibly given up. Your Recollection must certainly enable you to say that there is a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate or of the States which is considered as the same thing from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making treaties and if the southern states attend to their Duty, this will imply $^2/_3$ of the states in the Union together with the President, a security rather better than the present 9 States especially as Vermont and the Province of Main may be added to the Eastern Interest and you may recollect that when a Member, Mr. Willson objected to this Proviso, saying that in all Govts. the majority should govern it was replyed that the Navigation of the Mississippi after what had already happened in Congress was not to be risqued in the Hands of a meer Majority and the Objection was withdrawn.[3]

Another North Carolina delegate, William R. Davie, explained to the ratification convention of his State why the treaty-making power had been lodged in the Senate and the two-thirds rule adopted. He said:

The extreme jealousy of the little states, and between the commercial states and the non-importing states, produced the necessity of giving an quality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties. Without the equality, they apprehended that their interest would be neglected or sacrificed in the negotiations. This difficulty could not be got over. It arose from the unalterable nature of things. Every man was convinced of the inflexibility of the little states in this point. . . . I have only to add the principle upon which the General Convention went—that the power of making treaties could nowhere be so safely lodged as in the President and Senate; and the extreme jealousy subsisting between some of the states would not admit of it elsewhere.[1]

In discussing the treaty-making power Rufus King, who had been a member of the Federal convention, had this to say in the Senate in 1818:

[2] Farrand, op. cit., II, 548.
[3] Id., III, 306.
[1] Id., III, 348.

There is a peculiar jealousy manifested in the Constitution concerning the power which shall manage the foreign affairs, and make treaties with foreign nations. Hence the provision which requires the consent of two-thirds of the Senators to confirm any compact with a foreign nation that shall bind the United States; thus putting it in the power of a minority of the Senators, or States, to control the President and a majority of the Senate; a check upon the Executive power to be found in no other case.[5]

In 1834 Madison wrote to Edward Coles:

It is well known that the large States, in both the Federal and State conventions, regarded the aggregate powers of the Senate as the most objectionable feature of the Constitution.[6]

Some of the State ratification conventions were dissatisfied with the arrangement which gives a minority of the Senate the power to defeat treaties. Other conventions seemed to think the two-thirds rule was not a sufficient safeguard. The Virginia and North Carolina conventions proposed an amendment providing that no commercial treaty should be ratified without the concurrence of two-thirds of the entire Senate, adding: "But no treaty dealing with the territorial rights and claims of the United States, or their rights of fishing in the American seas or navigating the American rivers shall be made except in case of the most urgent and extreme necessity," and then only with the concurrence of three-fourths of the whole number of Members of both Houses of Congress.[7]

When the first Congress took up proposals to amend the Constitution the recommendation from Virginia and North Carolina was rejected by the Senate.

North Carolina's convention proposed another amendment providing that no treaty which was opposed to existing laws of the United States should be valid until such laws were repealed, and that no treaty should be valid which was contradictory to the Constitution. Apparently Congress looked upon this amendment as unnecessary, since it had already been established that a law could set aside a treaty or a treaty a law, the latest one in point of time prevailing over the other.

The point to be remembered always in passing judgment upon the treaty-making arrangement is that it was devised as a compromise, to meet existing conditions and apprehended dangers. The conditions then existing have long since disappeared, and the dangers that were apprehended are no longer considered so. New conditions, such as the admission of many States and the election of Senators by popular vote, have made the treaty-making power as fixed in the Constitution not only unsuitable, but unjust and dangerous.

COLLISIONS WITH THE LAW-MAKING POWER

On several occasions controversies have developed between the House of Representatives, as part of the legislative power, and the Senate or the President, or both, representing the treaty-making power.

[5] Id., III, 424.
[6] Id., III, 534.
[7] Ames, Proposed Amendments to the Constitution, 267.

The House of Representatives has always insisted that when legislative stipulations are inserted in a treaty "it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect." [8] A resolution to this effect, believed to have been drafted by Madison, was passed by the House in 1796 by a vote of 57 to 35, in the controversy with President Washington over the Jay treaty. A resolution to the same effect was adopted by the House in 1871, without debate. This opinion remains as the settled attitude of the House.

In the Jay treaty controversy the House disclaimed possession of any part of the treaty-making power. At the same time it stood up stoutly for its constitutional rights as part of the legislative power. Jefferson supported Madison in that attitude. He wrote to Madison in March 1796, expressing the opinion that the House, as one branch of the legislature, was perfectly free to refuse its assent when a treaty included matters confided by the Constitution to the legislature, in all cases "when in its judgment the good of the people would not be served by letting the treaty go into effect." [9]

In 1852 the United States circuit court said through McLean, chief justice:

> A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably, applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power.

The United States Supreme Court has not passed upon this question. Mr. Justice Brown, in *De Lima* v. *Bidwell*, in referring to the treaty of peace with Spain, observed:

> We express no opinion as to whether Congress is bound to appropriate the money. * * * It is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty.[10]

In 1868 the House of Representatives took a decided stand against the practice of including legislation within a treaty without the previous assent of Congress. The treaty for the acquisition of Alaska not only stipulated that the United States should pay $7,200,000 to the Emperor of Russia, but that certain of the inhabitants should be admitted to the privileges and immunities of citizens of the United States. The House by a vote of 98 to 49 declared that these stipulations dealt with subjects which under the Constitution are submitted to the power of Congress, and that the consent of Congress was necessary before the treaty could be carried into effect; and that the House approved of the stipulations. The bill appropriating the purchase money included the declaration that the stipulations of the treaty could not be carried into full force

[8] Crandall, op. cit., 169.
[9] Id., 168.
[10] Id., 178, 240.

and effect except by legislation to which the consent of both houses of Congress was necessary.[11]

This measure, which was adopted by the House by a vote of 91 to 48, has the features of compromise strongly impressed upon it, observes Wharton, in his International Law Digest.[12]

The treaty-making power has sometimes acknowledged the right of Congress to determine whether treaties should be made affecting the revenue. The Hawaiian Reciprocity Treaty of 1876 provided that it should not go into effect until the passage of an act of Congress to carry it into effect. The reciprocity convention between the United States and Mexico in 1883 stipulated that it should take effect only when necessary legislation had been enacted, but added that the necessary legislation should "take place within twelve months from the date of the exchange of ratifications." Congress did not act within that period, nor even after the time had been extended twice by convention, and the treaty therefore never became effective.[13]

The reciprocal trade agreements made during the present administration were completed in pursuance of an act of Congress authorizing such agreements.

The House has never failed to assent to the appropriation of money to carry treaty stipulations into effect, but it has always found fault with the practice of legislating in treaties.

The late Samuel W. McCall, for many years a leading Member of the House of Representatives, discussed this question in the Atlantic Monthly for October 1903. After a general survey of the power of the Senate he wrote:

> The expansion of the power of the Senate in an undemocratic as well as an unconstitutional direction is also seen in the growing tendency to pass laws, and especially taxation laws, by treaty. Treaties are high contracts between nations, and it can hardly be believed that it was within the contemplation of the Constitution so elaborately to construct a legislative machine and at the same time to throw the whole mechanism out of gear by a single clause regarding treaties, providing that the President and Senate might call in a foreign potentate and might make laws for the internal government of the United States. Treaties have the force of law, but they should obviously be within the fair scope of the treaty-making power. At any rate it would scarcely be reasonable to claim that they set aside the Constitution, and if we are to regard the Senate as a part of two legislative machines, it cannot, as a part of either, do the things prohibited by the Constitution. Under that instrument revenue bills must originate in the House. How, then, can they originate by treaty? It would, indeed, be a curious spectacle, that of the Senate, composed in the way it is, sitting behind closed doors, and deciding in secret what taxes the American people are to pay.

When the controversy over the Jay treaty was inflaming the country the Legislature of Virginia adopted a resolution recommending adoption of a constitutional amendment providing—

> that no treaty containing any stipulation upon the subject of the powers vested in Congress shall become the supreme law of the land until it shall have been approved in those particulars by a majority in the House of Representatives, and that the President before he shall ratify any treaty shall submit the same to the House of Representatives.[14]

[11] Crandall, op. cit., 176; Moore, Int. Digest, V, 228.
[12] Moore, V, 228.
[13] Ames, op. cit., 268; Moore, V, 222.
[14] Ames, op. cit., 268.

FRICTION BETWEEN PRESIDENT AND SENATE

The expectation of the framers of the Constitution was that the Senate would constantly advise the President in treaty matters, from the inception of a treaty project to its approval and ratification. This expectation was soon proved to be wrong. Friction developed almost immediately between President Washington and the Senate. His decision never to appear again personally in council with the Senate was followed by his successors. The Senate has occasionally given advance advice to the President concerning the making of treaties, and in early days it was consulted sometimes before negotiators were sent abroad, but in recent years the President has directed the formulation of treaties without consulting the Senate as a body. Members of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs have been kept advised as to the progress of treaty negotiations in some instances.

Although the Senate has rejected outright only a few of the hundreds of treaties submitted to it, numerous compacts have been mangled to such a degree that the Presidents have refused to complete ratification of them. The Senate has forced objectionable alterations which have antagonized foreign governments, proposed amendments which were obviously unconstitutional,[15] delayed action to an unconscionable degree, claimed prerogatives which belonged to the Executive, quarreled with the House, provoked foreign ill will and retaliation, misrepresented true American foreign policy, and played partisan politics in not a few cases.

James Bryce, in his American Commonwealth, wrote of the Senate's treaty-making record as it appeared in 1888:

> For ratification a vote of two-thirds of the senators present is required. This gives great power to a vexatious minority, and increases the danger, evidenced by several instances in the history of the Union, that the Senate or a faction in it may deal with foreign policy in a narrow, sectional, electioneering spirit. When the interest of any group of States is, or is supposed to be, opposed to the making of a given treaty, that treaty may be defeated by the senators from those States. They tell the other senators of their own party that the prospects of the party in the district of the country whence they come will be improved if the treaty is rejected and a bold aggressive line is taken in further negotiations. Some of these senators, who care more for the party than for justice or the common interests of the country, rally to the cry, and all the more gladly if their party is opposed to the President in power, because in defeating the treaty they humiliate his administration. Supposing their party to command a majority, the treaty is probably rejected, and the settlement of the question at issue perhaps indefinitely postponed.
>
> It may be thought that the party acting so vexatiously will suffer in public esteem. This happens in extreme cases; but the public are usually so indifferent to foreign affairs, and so little skilled in judging of them, that offenses of the kind I have described may be committed with practical impunity. It is harder to fix responsibility on a body of senators than on the executive; and whereas the executive has usually an interest in settling diplomatic troubles, whose continuance it finds annoying, the Senate has no such interest, but is willing to keep them open so long as there is a prospect of sucking some political advantage out of them. The habit of using foreign policy for electioneering purposes is not confined to America. We have seen it in England, we have seen it in France, we have seen it even in monarchical Germany. But in America

[15] Wright, The Control of American Foreign Relations, 119.

the treaty-confirming power of the Senate opens a particularly easy and tempting door to such practices.[16]

This penetrating analysis was a true forecast as well as an historical review. The struggle over the League of Nations (embodied in the Treaty of Versailles) during 1919 and 1920 revealed that Viscount Bryce was not wrong in emphasizing the ease with which the treaty-confirming power of the Senate can be used for political partisan purposes.

Indeed, another English viscount, better known as Sir Edward Grey, writing during the Senate's controversy with President Wilson, said that the American Constitution "not only makes possible, but, under certain conditions, renders inevitable conflict between the Executive and the Legislature." A commentator on constitutional questions quotes Viscount Grey's observation, and referring to the many cases of friction between the President and the Senate, adds:

> The prevalence of such incidents suggests that the difficulties which arose between President Wilson and the Senate in considering the Peace Treaty of Versailles were not wholly due to personalities. It suggests that institutions may have been partly to blame.[17]

This opinion coincides with that of Viscount Bryce, and is in sharp contrast to the well-known diary opinion of John Hay, who was smarting under the defeat of certain treaties of his own making when he wrote the following:

> A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain, it will never leave the arena alive.[18]

And Secretary Hay had written before this:

> The fact that a treaty gives to this country a great, lasting advantage seems to weigh nothing whatever in the minds of about half the Senators. Personal interest, personal spites, and a contingent chance of petty political advantage are the only motives that cut any ice at present.[19]

It must be borne in mind, however, that Secretary Hay had failed to protect the interests of the United States in negotiating the first Hay-Pauncefote treaty, and that the Senate had made amendments which swept away the embarrassing Clayton-Bulwer treaty of 1850 and also enabled the United States to fortify the Panama Canal. These amendments having been rejected by Great Britain, a second treaty was negotiated, containing the protective stipulations demanded by the Senate, and it was duly ratified.[20]

In 1905 Secretary Hay negotiated treaties with several foreign governments, providing for arbitration of differences of a legal nature. Each compact called for the definition of every arbitration dispute in a "special agreement," which was not to be submitted to the Senate. That body insisted that it had the right to pass upon each specific dispute to be arbitrated. It therefore amended the treaties by substituting the word "treaty" for "special agreement."

[16] Bryce, American Commonwealth (2d ed.), I, 118.
[17] Wright, op. cit., 361.
[18] Thayer, The Life of John Hay, II, 393.
[19] Id., II, 274.
[20] Moore, op. cit., III, 210 et seq.

On the advice of Secretary Hay, President Roosevelt dropped the whole project, refusing to ask foreign governments to accept the Senate amendment. But later, in 1908, Secretary Root took up the project, and by accepting the Senate amendment the treaties were ratified.[21]

Thus it is demonstrated that Mr. Hay's intemperate language in referring to the Senate was unjustified. The Senate exercised far-seeing statesmanship in obliterating the quasi partnership of the United States and Great Britain in Central American affairs and in securing the Panama Canal under exclusive American control and defense. Numerous additional instances may be cited in which the Senate has prevented the executive from making serious mistakes in treaties. These precedents, accomplished in spite of the undemocratic and impolitic two-thirds rule for approval of treaties, may be taken as proof of the old saying that "big men using common sense can make any system work." If this had not been true in many instances the United States would have had many melancholy reverses through the workings of the two-thirds rule.

WHY THE HOUSE WAS EXCLUDED FROM TREATY MAKING

Two facts should be borne in mind in passing judgment upon the treaty-making power. The first is that the framers were accustomed to the system of treaty making by Congress. Many of them had taken part in the negotiation of treaties. They fully intended to provide that the Senate should watch every step in the treaty-making process, from the selection of diplomatic representatives to the formulation of instructions to these negotiators, the quick alteration of plans and procedures according to exigencies abroad, constant consultation with the President, and finally the rigid scrutiny of signed treaties, with power to make reservations, to amend, or to reject altogether.

The second fact to be remembered is that the Union could not have been formed without giving to the States equal suffrage in the Senate. The reason for the refusal of small States to join unless this equality was granted was their fear that their interests might be sacrificed in the making of treaties. When equal suffrage of the States was agreed to in the convention the framers then clinched the safety of small States, as they thought, by establishing the rule that no treaty could be made without the concurrence of two-thirds of the Senators present.

Representatives of the small States had opposed the idea of giving the House of Representatives a share in the treaty-making power because they feared the weight of the greater representation from the large States. But the small-State spokesmen also believed that the House would be unsuited to the task of supervising the *negotiation* of treaties. Few suggestions were made that the House would not be qualified to pass judgment upon treaties already negotiated. Hamilton, in the Federalist, expressed the prevailing idea that "the fluctuating and multitudinous composition" of the House

[21] Wright, op. cit., 109.

would unfit it for a share in treaty making; but even he failed to foresee that the *negotiation* of treaties would be taken over by the Executive, leaving to the other branch only the duty of passing judgment upon treaties already signed. He said:

> The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction *in the progressive stages of a treaty*, would be a source of so great inconvenience and expense as alone ought to condemn the project.

But in the same paper he emphasized the importance of treaties and the necessity of legislative control over them:

> The vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[22]

In the Federal convention this suggestion was made by Madison:

> Mr. Madison hinted for consideration, whether a distinction might not be made between different sorts of Treaties—Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms—and requiring the concurrence of the whole Legislature in other Treaties.[23]

James Wilson made this point when the convention was considering the two-thirds rule as relating to treaties of peace:

> If two-thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority.[24]

Madison made this note, referring to Roger Sherman of Connecticut:

> Mr. Sherman was agst. leaving the rights, established by the Treaty of Peace, to the Senate, & moved to annex a proviso that no such rights shd be ceded without the sanction of the Legislature.
> Mr. Govr. Morris seconded the ideas of Mr. Sherman.[25]

Mr. Williamson, delegate from North Carolina, said:

> Treaties are to be made in the branch of the Government where there may be a majority of the States without a majority of the people.[26]

This was Elbridge Gerry's opinion, as noted by Madison:

> Mr. Gerry enlarged on the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people. The Senate will be corrupted by foreign influence.[27]

In the ratification conventions in the States there were delegates who had been members of the constitutional convention. They explained and defended the Constitution. In many instances the treaty-making power was discussed, and in all cases where explanation was given as to the reason why the House of Representatives was excluded from the treaty-making power, it was stated that the House was not properly constituted to take part in the *negotiation* of treaties.

In the South Carolina Legislature, the subject was discussed by

[22] Federalist, No. 75. (Italics supplied in this and subsequent extracts.)
[23] Farrand, op. cit., II, 394.
[24] Id., II, 548.
[25] Id., II, 548.
[26] Id., II, 548.
[27] Id., II, 548.

Maj. Pierce Butler, who had been a member of the Philadelphia convention. Speaking of the objections that had been made to giving the treaty-making power exclusively to the President, he said:

> The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that *negotiations* always required the greatest secrecy, which could not be expected in a large body.

Gen. Charles Cotesworth Pinckney concurred in this explanation, saying that—

> some members were for vesting the power for making treaties in the legislature; but the secrecy and dispatch which are so frequently necessary in *negotiations* evinced the impropriety of vesting it there. The same reason showed the impropriety of placing it solely in the House of Representatives.[28]

James Wilson, who had proposed in the constitutional convention to require the approval of treaties by Congress, spoke on the subject in the Pennsylvania ratification convention. His remarks show clearly that he shared in the opinion so generally expressed, that the House of Representatives was denied participation in treaty making because it was not properly constituted to take part in *negotiations*. He said:

> Some gentlemen are of opinion that the power of making treaties should have been placed in the legislature at large; there are, however, reasons that operate with great force on the other side. Treaties are frequently (especially in time of war) of such a nature, that it would be extremely improper to publish them, or even commit the secret of their *negotiation* to any great number of persons. * * * In their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make; they will be made between us and powers at the distance of three thousand miles. A long series of *negotiation* will frequently precede them; and can it be the opinion of these gentlemen that the legislature should be in session during the whole time?[29]

In the North Carolina convention it was urged that, since treaties were to be the supreme law of the land, the House of Representatives ought to have a voice in making them. The objection also was made that the President and 10 Senators might make treaties of alliance and dispose of the country in such manner as they might please. To these objections William R. Davie, who had been a member of the Federal convention, replied:

> The power of making treaties has, in all countries and governments, been placed in the executive departments. This has not only been grounded on the necessity and reason arising from that degree of secrecy, design, and despatch, which is always necessary in *negotiations* between nations, but to prevent their being impeded, or carried into effect, by the violence, animosity, and heat of parties, which too often infect numerous bodies. Both of these reasons preponderated in the foundation of this part of the system.[30]

Rufus King, speaking in the Senate in 1818, told his colleagues how he and other members of the Federal convention expected the Senate to take part in all phases of treaty-making, from first to last. He said, referring to the Senate's advice and consent in the making of treaties:

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[28] Id., III, 250.
[29] Elliot's Debates (2d ed.), II, 505.
[30] Crandall, op. cit., 61.

In these concerns the Senate are the constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient. . . . To make a treaty *includes all the proceedings by which it is made;* and the advice consent of the Senate being necessary in the making of treaties, must necessarily be so, touching *the measures employed in making* the same. . . . The objections against the agency of the Senate in making treaties, or in advising the President to make the same, cannot be sustained, but by giving to the Constitution an interpretation different from its obvious and most salutary meaning.[31]

PROPOSED AMENDMENTS RELATING TO THE TREATY-MAKING POWER

In addition to the proposals in the Federal convention for amendment of the clause relating to treaty making, demands were made in the State ratification conventions for amendments. Richard Henry Lee, a member of the outgoing Congress, criticized the treaty-making provision of the new Constitution a month after the Philadelphia convention adjourned. He said, in a public letter:

The President and two-thirds of the Senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and State constitutions incompatible with them. This power in the President and Senate is absolute, and the judges will be found to allow full force to whatever rule, article or thing the President and Senate shall establish by treaty. Whether it be practicable to set any bounds to those who make treaties, I am not able to say; if not, it proves that this power ought to be more safely lodged.[32]

George Mason opposed the treaty-making provision while he was a member of the Philadelphia convention, and later as a member of the Virginia ratification convention. In his public statement of the reasons why he had refused to sign the Constitution he wrote:

By declaring all treaties supreme laws of the land the executive and the Senate have, in many cases, an exclusive power of legislation, which might have been avoided by proper distinctions with respect to treaties and requiring the assent of the House of Representatives where it could be done with safety.[33]

In the Virginia convention Mason said:

There is nothing in that Constitution to hinder a dismemberment of the empire. Will any gentleman say that they may not make a treaty, whereby the subjects of France, England, and other powers, may buy what lands they please in this country? * * * The President and Senate can make any treaty whatsoever. We wish not to refuse, but to guard, this power, as it is done in England. The empire there cannot be dismembered without the consent of the national Parliament. We wish an explicit declaration, in that paper, that the power which can make other treaties cannot, without the consent of the national Parliament—the national legislature—dismember the empire. The Senate alone ought not to have this power; much less ought a few States to have it. No treaty to dismember the empire ought to be made without the consent of three-fourths of the legislature in all its branches.[34]

William Grayson, who became one of Virginia's Senators, ob-

[31] Farrand, op. cit., III, 424.
[32] *Ford's Pamphlets on the Constitution*, 312.
[33] Id., 331.
[34] Elliot's Debates, III, 508.

jected strongly to the treaty-making power in discussing the subject in the Virginia ratification convention. He said:

> It ought to be expressly provided that no dismemberment should take place without the consent of the legislature. * * * There is an absolute necessity for the existence of the [treaty-making] power. It may prevent the annihilation of society by procuring a peace. It must be lodged somewhere. The opposition wish it to be put in the hands of three-fourths of the members of both houses of Congress. It would then be secure. It is not so now.[35]

Patrick Henry was equally outspoken in the Virginia convention against lodging the treaty-making power exclusively in the President and Senate. He said:

> They might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if anything should be left us, it would be because the President and Senators were pleased to admit it. The power of making treaties, by this Constitution, ill-guarded as it is, extended farther than it did in any country in the world.[36]

The proposed amendment recommended by the Virginia convention, relating to commercial treaties and treaties for the cession of American territory or American rights, has been already mentioned in this paper, as well as the amendment proposed by the North Carolina convention.

The New York convention, in ratifying the Constitution, declared that—

> no treaty was to be construed so to operate as to alter the constitution of any State.[37]

The Harrisburg conference, held soon after ratification of the Constitution by the Pennsylvania convention, petitioned the legislature to obtain an amendment providing that no treaty thereafter concluded should be—

> deemed or construed to alter or affect any law of the United States, or of any particular State—

until assented to by the House of Representatives.[38]

Mention has been made in this paper of the resolution adopted by the Virginia Legislature in 1796, during the discussion of the Jay treaty, recommending adoption of an amendment providing that consent of the House of Representatives should be requisite in cases of treaty stipulations affecting the powers vested in Congress.

The opinion that the House of Representatives is not constitutionally bound to make appropriations called for in treaties was ably championed by John Randolph Tucker in a report to the House Committee on the Judiciary, March 3, 1887 (H. Rept. 4177, 49th Cong., 2d sess.).

When certain commercial treaties were submitted to the Senate in 1884, it was contended that they restricted the power of Congress to levy duties on merchandise. The dispute led to the introduction of a proposed amendment to the Constitution by Mr. Townshend, of Illinois, providing that treaties should be made by and with the advice and consent of the House of Representatives as well as the

[35] Id., III, 613.
[36] Id., III, 500.
[37] Doc. History of the Const., II, 194.
[38] Elliot's Debates, II, 546.

Senate. Mr. Blanchard, of Louisiana, offered another amendment, which required that the prior consent of Congress should be necessary in making reciprocity treaties affecting the revenues. Later, in 1890, Congress seems to have assented to the making of treaties affecting the revenues, as it authorized the President to reestablish certain duties as to particular countries unless he could obtain by treaty certain commercial privileges from them.[39]

A resolution proposing an amendment providing that all treaties be ratified by majority vote of the Senate and House of Representatives was introduced in 1919, 1921, 1923, 1925, and 1927 by Representative Anthony J. Griffin, of New York. In 1930, 1931, and 1935 he offered this resolution in a modified form, "conferring upon the House of Representatives coordinate power in the ratification of treaties." These successive resolutions were referred to the Committee on the Judiciary.

In 1941 Representative Cannon of Florida offered a resolution proposing an amendment providing for ratification of treaties by the Senate and the House of Representatives; and in 1943 he reintroduced his resolution. Mr. Priest, of Tennessee, offered a resolution in the House in 1942, and again in 1943, proposing an amendment providing for ratification of treaties by the Senate and House of Representatives. A resolution providing for treaty ratification by a Senate majority was introduced in the Senate by Mr. Gillette, of Iowa, in 1943, and referred to the Senate Committee on the Judiciary. No action has been taken by the Judiciary Committee of either house on any of these resolutions.

The late Samuel W. McCall of Massachusetts, in an article in the Atlantic Monthly for September 1920, declared that

> if we are to have open, free, and responsible democratic government in America the Senate must be reformed.

He suggested that—

> the country might well enter upon the work by taking away from the Senate the power to ratify treaties, and conferring it upon the House of Representatives.
>
> We have the Senate,

he wrote,

> with the mechanism of a bygone age, and with a structure so undemocratic as to make it the glaring solecism of the time. It retains all its original powers, swollen by those it has drawn to itself from the other departments of the government. The evil of the original inequality in its representation has been greatly intensified by the admission of so many small States.

In support of his argument that the House should have exclusive power to ratify treaties Mr. McCall wrote:

> In Great Britain the Cabinet is responsible directly to the House of Commons, which is chosen by the British electorate. The Crown makes treaties, but the Crown is little more than a fiction and does in the long run just what the Cabinet wishes it to do. If the Cabinet cannot command the support of the Commons, it must either resign or appeal to the people, in which case they can directly express themselves and decide the issue. The result is that the government passes upon treaties with the promptitude which the nature of the case demands, and does not permit a time to elapse in which new wars may

[39] Ames, op. cit., 268-269.

spring up and expose civilization to the frightful consequences of inaction. If Great Britain can be safe with her system of popular rule, why should it not be safe for America to have a treaty made in the first instance by a President who is no fiction, but a very vital institution, and then have it ratified by a House of Representatives chosen by the people in the different districts? There would be a check here which does not exist in England.

Mr. McCall was no longer a member of the House of Representatives when he wrote the foregoing, and no resolution has been offered in Congress proposing to lodge the treaty-confirming power exclusively in the House.

TREATY-MAKING THEORY OF THE FRAMERS BECAME OBSOLETE LONG AGO—TREATY-MAKING POWER WAS PLANNED TO MEET CONDITIONS THAT NO LONGER EXIST

The foregoing review shows that the framers of the Constitution shaped the treaty-making power according to a theory that soon became obsolete. This theory was that national interest and security made it necessary that the Senate should participate at every step in the origination and negotiation of treaties. The conception was logical at the time, as the Continental Congress had originated treaty projects, received foreign ministers, chosen negotiators, prepared their instructions, directed their operations, amended their tentative drafts, approved the finished work, ordered exchange of ratifications, and proclaimed treaties as laws to be obeyed by the States.

In creating two houses of Congress the framers planned that the Senate should perform the negotiatory functions of the old Congress.

The framers did not perceive, as they planned the executive power, that they were giving to the President authority to ignore the advice and consent of the Senate in originating and negotiating treaties. President Washington at first adopted the theory of the framers by consulting the Senate before entering into negotiations. But he soon abandoned this procedure as impracticable, and the successive Presidents have rarely consulted the Senate prior to negotiating treaties.

Like certain other theories favored by the framers, such as that relating to the process of electing the President, the idea underlying the treaty-making power proved to be erroneous in practice. For nearly 150 years treaties have been shaped by a method unknown to the framers. Had they foreseen the method that experience finally developed they doubtless would have provided that treaties should be made with the concurrence of Congress by majority vote.

The reason why they would have rejected the two-thirds rule, if they had foreseen future conditions, is that the dangers they planned to avert have long ago disappeared. The framers knew that the two-thirds rule relating to treaties was not in harmony with the spirit and purpose of the Constitution; that it was a denial of popular government; that it was the only provision in their instrument which gave such decisive power to a minority. They adopted

the rule with reluctance, and only under the stress of necessary compromise as a means of saving the Union. They had brought the large and small States together by giving control of the purse to the House of Representatives and equal suffrage to the States in the Senate. But the small States insisted upon control of the treaty-making power by a minority of the Senate, and the framers were compelled to yield to this demand. Yet in the very act of conceding the two-thirds rule they voted by majority rule.

All of the provisions of the Constitution were adopted by majority vote in the convention, and the Constitution itself was ratified by majority vote in the State conventions.

The Constitution contemplates that Congress may enact laws by majority vote; that the President and Vice President may be elected by majority vote; that the Supreme Court and inferior courts may render judgment by majority vote; that a majority of the States represented in the House may elect a President when the electors fail; that Congress may annul treaties by majority vote; that Congress by majority vote may permit a State to make a compact with a foreign power; that in case of a vacancy in the office of President and Vice President the Congress may by majority vote name the acting President; that the Senate by majority vote may approve or reject all nominations to Federal office; and that the House by majority vote may impeach any person holding Federal office.

The only cases in which a two-thirds vote is required in both houses of Congress are in passing a bill or resolution over a veto, in proposing amendments to the Constitution, and in removing political disabilities. In each house a two-thirds vote is required for expelling a member. In the Senate a two-thirds vote of members present is required for approval of a treaty and for conviction of an impeached Federal officer. The Senate by a majority of all members may elect a Vice President when the electors fail to elect.

It is seen that operation of the Government by majority vote is the general rule of the Constitution.[10]

It is also seen that the clause relating to the treaty-making power has been essentially amended. Under the practice of a century and more the Senate does not perform the functions intended by the framers.

[10] "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided (*Hakew.*, 73)." Jefferson's Manual.

FOURTEEN POINTS SHOWING WHY THE TREATY-MAKING POWER SHOULD BE SHARED BY THE HOUSE OF REPRESENTATIVES

A careful, impartial study of the theory of the treaty-making power and the actual operation of that power warrants the following conclusions:

1. The undemocratic, unjust, discriminatory treaty-making arrangement was made by the framers unwillingly, under pressure, and contrary to the spirit of the Constitution.

2. The exclusion of the House of Representatives from the treaty-making power was based primarily upon the assumption that secrecy was necessary and that the Senate would participate in originating and negotiating treaties.

3. The two-thirds rule giving a minority the power to veto treaties was adopted as a compromise to prevent rupture of the Union, and was admitted to be undemocratic, unjust, discriminatory, dangerous, and contrary to the spirit of the Constitution.

4. The treaty-making power has repeatedly usurped legislative power, causing collisions between the two houses of Congress.

5. The exercise of an unfair advantage given by the treaty-making power to a Senate minority has repeatedly caused friction between the President and Senate.

6. The treaty-making power enables partisan and political cliques to sacrifice the public interest, and Senate minorities have repeatedly abused this power.

7. Elections, enactment of laws, abrogation of treaties, judgments of courts, and other operations of government are conducted under majority rule.

8. The authority which makes war should have power to make peace.

9. Treaties are laws and should be made by the legislative power, which includes the President.

10. Politics, partisanship, and personal animosities would be less likely to imperil the national interest if the treaty-making power were lodged in Congress instead of giving veto power to a minority in the Senate.

11. Since legislation is usually necessary to effectuate treaties the House is compelled to weigh the expediency of treaties and yet is expected to make appropriations even if it condemns them. The House shares the power to grant money, but unlike the Senate it is denied, in the case of treaties, the power to refuse to grant money; therefore its power over the purse is curtailed.

12. By making treaties affecting the revenue the treaty-making power interferes with the prerogative of the House to originate revenue bills and prevents the House from making accurate estimates of revenue.

13. The treaty-making power enables 34 Senators representing 17 States to defeat a treaty favored by the President and 62 Senators representing 31 States. The minority may represent only 8,200,000 voters in their States as against 42,000,000 voters in the other 31 States.

14. Action upon treaties by the President and both houses of Congress would fairly represent the will of all the people in all the States.